

CHAPTER FOUR CAUSATION

4.3. ISSUES RELATING TO THE SEQUENCE OF EVENTS

4.3.2. SUBSEQUENT EVENTS

Introductory Note

a) Subsequent events give rise to some of the most complex causation problems.

A first type of problem occurs when it is alleged that a subsequent event “broke the chain of causation”, i.e. that the subsequent event is the real cause of the injury to the plaintiff. English law will generally subsume that problem under the heading “*novus actus interveniens*”,¹ while under French law it would be part of the discussion of “causes external to the defendant” (*causes étrangères au défendeur*).² Of course it is also known to German law.³ To the extent that the subsequent event breaking the chain of causation consists in the intervention of a third party (or of the victim), the issue is covered in the next subsection.⁴ Cases where the chain of causation is broken by a natural event can be seen either as applications of the general principles relating to causation⁵ or as cases of *cas fortuit* or *force majeure*.⁶

b) Secondly, subsequent events can work so as to lead to the same injury as the conduct of the alleged tortfeasor (hereinafter called “supervening events”), i.e. the alleged tortfeasor can claim that the same injury would have occurred in any event and argue that causation should thus be denied (at least as of the moment the supervening events takes place). Supervening events can be of various types:⁷

- a condition of the plaintiff which independently evolves so as to produce the same kind of injury, e.g. the plaintiff is disabled through an accident caused by the defendant, but he or she was suffering from a disease which was going to disable him

¹ See *Clerk & Lindsell on Torts* at 54-61, para. 2-24 to 2-37; Rogers at 224-31; Markesinis and Deakin at 191-6.

² Viney and Jourdain, *Conditions* at 217ff., para. 383ff.; Le Tourneau and Cadiet at 259ff., para. 899ff.; Starck, Roland and Boyer at 458ff., para. 1110ff.

³ Staudinger-Medicus, § 249 at 48-53, para. 72-88, Münchener-Grunsky, § 249 at 373-85, para. 52-74.

⁴ *Infra*, 4.3.3.

⁵ *Supra*, 4.1.

⁶ See *supra*, 4.1.3., Introductory Note under h) and Chapter III, 3.2.3.

⁷ See the classification made by Münchener-Grunsky, § 249 at 388, para. 78.

CAUSATION

- or her in any event;⁸
- the intervention of a third party, e.g. the contents of a car trunk were stolen, but the whole car was stolen the next day in any event;⁹
- natural events, e.g. a house is damaged, but the next day it is hit by lightning and burns down;
- the conduct of the plaintiff, e.g. a piece of furniture is damaged, but the plaintiff wanted to give it or throw it away in any event; or
- the conduct of the defendant.¹⁰

Even if that issue may seem fairly specific, it has provoked some controversy in English case-law as well as considerable discussions in German legal writing (under the keywords *hypothetische Kausalität* (hypothetical causation), *überholende Kausalität* (superseding causation) or *Reserveursache* (reserve cause)). It is discussed below in the light of the two leading English cases.

c) Subsequent events raise causation problems in a third respect, namely when they contribute to aggravating the situation of the victim in a way which would not have happened but for the conduct of the alleged tortfeasor, but without being in any way related to that conduct. Difficulties appear in particular when some time has elapsed between the conduct of the alleged tortfeasor and the subsequent event. While this type of problem is essentially solved by applying the general rules relating to causation, some peculiarities make it worth examining more closely. A pair of controversial cases, one from Germany and one from France, has been included below for that purpose.

⁸ For a concrete example, see *infra*, **4.E.30**. There is obviously a close connection between that type of situation and the issue of pre-existing conditions, dealt with *supra*, 3.1. Some distinction can be made inasmuch as pre-existing conditions are those conditions which “amplify” the effect of the conduct of the alleged tortfeasor (without necessarily leading to injury in and of themselves), whereas the type of situation at issue here concerns rather the independent evolution of pre-existing conditions. French law expressly acknowledges that distinction: *supra*, **4.F.26**. and notes thereafter.

⁹ For a concrete example, see *infra*, **4.E.29**.

¹⁰ This includes the issue of whether the defendant, acting lawfully, could also have caused the same damage (*rechtmäßiges Alternativverhalten* under German law), dealt with *supra*, **4.E.12.**, **4.G.13.** and notes hereunder.

SEQUENCE OF EVENTS

[4.3]

*House of Lords*¹¹
Baker v. Willoughby
and
*House of Lords*¹²
Jobling v. Associated Dairies Ltd.

4.E.29.-30.

SUPERVENING EVENTS

Supervening events may operate so as to reduce the liability of the original tortfeasor.

A. House of Lords, *Baker v. Willoughby*

4.E.29.

Shot in the injured leg

Facts: As he was crossing a street, the plaintiff was hit by the defendants' car and suffered injury to his left leg. The plaintiff sued the defendant for the damage. Before the action was heard, the plaintiff was shot in his injured leg in the course of an armed robbery. The leg was amputated as a consequence. At issue between the parties, among others, was whether and, if so, how the defendant's liability for injury to the plaintiff's leg was affected by the subsequent amputation of that leg.

Held: The court of first instance found in favour of the plaintiff and concluded that the liability of the defendant was not affected by the subsequent amputation of the leg. The court of appeal reversed that decision and held that the liability of the defendant extended only until the leg was lost as a result of the shooting incident and the amputation. The House of Lords allowed the appeal against the decision of the court of appeal and reinstated the judgment of the court of first instance.

Judgment: LORD REID¹³: "...The [defendant's] argument was succinctly put to your Lordships by his counsel. [The victim] could not run before the second injury: he cannot run now. But the cause is now quite different. The former cause was an injured leg but now he has no leg and the former cause can no longer operate. His counsel was inclined to agree that if the first injury had caused some neurosis or other mental disability, that disability might be regarded as still flowing from the first accident; even if it had been increased by the second accident the respondent might still have to pay for that part which he caused. I agree with that and I think that any distinction between a neurosis and a physical injury depends on a wrong view of what is the proper subject for compensation. A man is not compensated for the physical injury: he is compensated for the loss which he suffers as a result of that injury. His loss is not in having a stiff leg: it is in his inability to lead a full life, his inability to enjoy those amenities which

¹¹ [1970] AC 467.

¹² [1982] AC 794.

¹³ Lord Guest, Viscount Dilhorne and Lord Donovan agreed with Lord Reid. Lord Pearson delivered a separate concurring speech.

4.E.29.-30.

CAUSATION

depend on freedom of movement and his inability to earn as much as he used to earn or could have earned if there had been no accident. In this case the second injury did not diminish any of these. So why should it be regarded as having obliterated or superseded them?

If it were the case that in the eye of the law an effect could only have one cause then the respondent might be right. It is always necessary to prove that any loss for which damages can be given was caused by the defendant's negligent act. But it is commonplace that the law regards many events as having two causes; that happens whenever there is contributory negligence, for then the law says that the injury was caused both by the negligence of the defendant and by the negligence of the plaintiff. And generally it does not matter which negligence occurred first in point of time...

[Having reviewed the case-law, including *Performance Cars Ltd. v. Abraham*,¹⁴ Lord Reid continued:] These cases exemplify the general rule that a wrongdoer must take the plaintiff (or his property) as he finds him: that may be to his advantage or disadvantage. In the present case the robber is not responsible or liable for the damage caused by the respondent; he would only have to pay for additional loss to the appellant by reason of his now having an artificial limb instead of a stiff leg...

It is argued — if a man's death before trial reduces the damages why do injuries which he has received before the trial not also reduce the damages? I think it depends on the nature and result of the later injuries...

If the later injury suffered before the date of the trial either reduces the disabilities from the injury for which the defendant is liable, or shortens the period during which they will be suffered by the plaintiff then the defendant will have to pay less damages. But if the later injuries merely become a concurrent cause of the disabilities caused by the injury inflicted by the defendant, then in my view they cannot diminish the damages..."

B. House of Lords, *Jobling v. Associated Dairies Ltd.*

4.E.30.

Injury followed by illness

Facts: In January 1973, the plaintiff injured his back in a work accident, leading to incapacity to work. He sued the defendant, his employer, for damages. In 1976, before the case came to trial, he was diagnosed as having myelopathy, a condition unrelated to the accident, but which would in any event have caused the plaintiff to be totally unfit for work within a few months. At issue between the parties was whether the defendant remained liable beyond the point in time where myelopathy disabled the plaintiff.

Held: The court of first instance held that the defendant would remain liable for 50% of the loss of future earnings. The court of appeal reversed that decision and concluded that the defendant was not liable beyond the onset of myelopathy. The House of Lords dismissed the appeal and upheld the decision of the court of appeal.

¹⁴ [1962] 1 QB 33, [1961] 3 WLR 749, [1961] 3 All ER 413, CA.

Judgment: LORD KEITH OF KINKEL:¹⁵ “[After citing the last paragraph from the excerpt of *Baker v. Willoughby* reproduced above, Lord Keith concluded:] It seems clear from this passage that the principle of concurrent causes which Lord Reid selected as the ratio decidendi of the case would, if sound, apply with the same force where the supervening event is natural disease, as in the present case, as it does when the supervening event is a tortious act...

A notable feature of the speeches in *Baker v. Willoughby*... is the absence of any consideration of the possible implications of what may be termed the ‘vicissitudes’ principle... [Lord Keith then reviewed the case-law concerning that principle and its rationale.]

I am therefore of the opinion that the majority in *Baker v. Willoughby* were mistaken in approaching the problems common to the case of a supervening tortious act and to that of supervening illness wholly from the point of view of causation. While it is logically correct to say that in both cases the original tort and the supervening event may be concurrent causes of incapacity, that does not necessarily... provide the correct solution. In the case of supervening illness, it is appropriate to keep in view that this is one of the ordinary vicissitudes of life, and when one is comparing the situation resulting from the accident with the situation had there been no accident, to recognise that the illness would have overtaken the plaintiff in any event, so that it cannot be disregarded in arriving at proper compensation, and no more than proper compensation.

Additional considerations come into play when dealing with the problems arising where the plaintiff has suffered injuries from two or more successive and independent tortious acts. In that situation it is necessary to secure that the plaintiff is fully compensated for the aggregate effects of all his injuries... It might be said that a supervening tort is not one of the ordinary vicissitudes of life, or that it is too remote a possibility to be taken into account, or that it can properly be disregarded because it carries its own remedy. None of these formulations, however, is entirely satisfactory. The fact remains that the principle of full compensation requires that a just and practical solution should be found. In the event that damages against two successive tortfeasors fall to be assessed at the same time, it would be highly unreasonable if the aggregate of both awards were less than the total loss suffered by the plaintiff... The award against the second tortfeasor cannot in fairness to him fail to recognise that the plaintiff whom he injured was already to some extent incapacitated. In order that the plaintiff may be fully compensated, it becomes necessary to deduct that award so calculated from the assessment of the plaintiff’s total loss and award the balance against the first tortfeasor. If that be a correct approach, it follows that, in proceedings against the first tortfeasor alone, the occurrence of the second tort cannot be successfully relied on by the defendant as reducing the damages which he must pay. That, in substance, was the result of the decision in *Baker v. Willoughby*, where the supervening event was a tortious act, and to that extent the decision was... correct.”

Notes

(1) In the first annotated case, the House of Lords was faced with an awkward situation: the plaintiff’s leg had been injured in an accident for which the defendant was

¹⁵ In addition to the speech of Lord Keith, reproduced in part here, separate concurring speeches were also delivered by Lord Wilberforce, Lord Edmund-Davies, Lord Russell and Lord Bridge.

responsible, but some time later (and before trial) the injured leg had to be amputated following another unrelated accident for which robbers were responsible. The defendant relied on compelling logic: from the time of the second accident, it could no longer be said that the plaintiff's leg would not have been injured but for the defendant's conduct, since whatever injury was caused in the first accident was "absorbed" by the consequences of the second accident.

Lord Reid answered the argument of the plaintiff in two ways, which have to do as much with policy as with law. First, the award of damages does not aim to compensate for the injury to the leg as such, but rather for the loss of amenity and income-earning capacity which ensues. Those losses are not wiped out by the second accident.

Secondly, English law would not entitle the plaintiff to recover from the robbers (responsible for the amputation) more than the aggravation in his situation which they caused. In other words, the maxim "the tortfeasor takes his victim as he finds him" would have applied to the benefit of the robbers. Lord Reid cited as authority *Performance Cars Ltd v. Abraham*:¹⁶ in that case, the defendant's car collided with the plaintiff's, causing damage to its wing and bumper, so as to necessitate a respray of the lower part of the car. Two weeks before, the same car had been involved in a collision caused by another person, which had already damaged the wing so as to require a respray (which had not yet been carried out). The plaintiff's claim against the defendant for the cost of respraying the wing was dismissed, since at the time of the collision with the defendant's car, the wing was already damaged and the respray was already needed. If the liability of the defendant in the first annotated case was to cease at the time when the robbers shot the injured leg and the plaintiff could not recover from the robbers more than the additional injury which they had inflicted, the plaintiff would have been left uncompensated for the continuing consequences of the first accident.

According to Lord Reid, therefore, the first accident for which the defendant was responsible remained a cause of the plaintiff's injury even after the leg has been amputated, and the defendant accordingly remained liable even if the "but for" test would dictate otherwise.

(2) In the second annotated case, the House of Lords had to revisit the first annotated case in a situation where policy factors did not necessarily point in the same direction: the plaintiff had been partially disabled in an accident at work for which the defendant, his employer, was responsible, but subsequently (and again here before trial) he was independently affected by a disabling disease which was going to leave him totally unfit for work within a few months. In practical terms, the plaintiff was going to receive compensation for the consequences of the first accident through the insurance against accidents at work which by law the defendant was obliged to take, and for the consequences of the subsequent disabling disease through the public sickness and

¹⁶ [1962] 1 QB 33, [1961] 3 WLR 749, [1961] 3 All ER 413, CA.

invalidity insurance scheme.¹⁷

In *Jobling v. Associated Dairies*, the House of Lords was critical of *Baker v. Willoughby*: Lord Reid's rationale in that case did not make any distinction between supervening events of a tortious nature and natural diseases, and he did not take into account the impact of the so-called "vicissitudes" principle. According to that principle, in quantifying damages for loss of future earnings or earning power, it is always necessary to discount the award by a certain amount in order to reflect the possibility that many circumstances for which the defendant is not responsible (illness, etc.) might have happened later in life to prevent the victim from earning income.¹⁸ The House of Lords in *Jobling* held that the fact that a particular vicissitude had in fact occurred had to be specifically taken into account as a reason for reducing the victim's damages;¹⁹ in *Baker v. Willoughby*, the House of Lords had focussed on causation alone without paying attention to the "vicissitudes" principle. For Lord Keith, the only way to reconcile *Baker v. Willoughby* with that principle is to confine that decision to cases where the subsequent event is a tort; otherwise, the "vicissitudes" principle should apply to reduce the liability of the defendant. Other members of the House of Lords in *Jobling* even expressed a willingness to overrule *Baker v. Willoughby* altogether.²⁰

In the end, subsequent events which cause the same injury to the plaintiff are thus to be taken into account under English law, except, apparently, when they are tortious in nature. Commentators have generally expressed dissatisfaction with the state of law after the second annotated case, finding that the distinction between tortious and non-tortious events is difficult to justify.²¹

(3) Under German law, as mentioned above, supervening events have been widely discussed in legal writing and in case-law, under a variety of headings, the most widespread being *hypothetische Kausalität* (hypothetical causation)²² and *Reserveursache* (reserve cause, to be used further in the text).²³ The term *überholende*

¹⁷ In a break with tradition, the House of Lords quite openly took account of the work and social insurance benefits in its reasoning: see in particular the speech of Lord Wilberforce.

¹⁸ See *infra*, Chapter VIII, 8.E.23. and notes thereafter.

¹⁹ Similarly, a specific predisposition on the part of a victim will be taken into account as a form of vicissitude, though then the uncertainty of the eventual occurrence of the vicissitude will mean that the reduction in damages will be less than where, by the date of trial, the vicissitude has actually occurred: see *Smith v. Leech Brain*, *supra*, 4.E.24.

²⁰ See the speeches of Lord Bridge and Lord Edmund-Davies.

²¹ *Clerk & Lindsell on Torts* at 50-1, para. 2-16 and 2-17; Rogers at 200-3. See also Markesinis and Deakin at 184-91, who, drawing the attention to the parallels between those situations and loss of a chance claims, suggest that some form of proportional liability may offer a solution to these problems.

²² Used among others by Münchener-Grunsky, § 249 at 388ff., para. 78ff.; Soergel-Mertens, § 249 at 268ff., para. 152ff. and Lange, who devotes no less than a full chapter to the issue, which he terms *hypothetische Schadensentwicklung*.

²³ Used among others by Staudinger-Medicus, § 249 at 57ff., para. 98ff.

Kausalität is also used in earlier writings.²⁴ Unfortunately, despite a century of debate, there is no consensus yet.

The following points are generally accepted by case-law and legal writers:

- The issue does not concern factual causation as such (*im natürlichen Sinne*) — since there is no question that the wrongful conduct caused damage — but rather the broader issue of imputability (*Zurechnung*), so that policy considerations also matter.²⁵
- When the *Reserveursache* consists in a pre-existing (but not necessarily manifest) condition (*Anlage*) which would in time have caused the same injury as the wrongful conduct did, the defendant can invoke the *Reserveursache* to reduce or deny liability.²⁶ A case such as the second annotated case, *Jobling v. Associated Dairies Ltd.*, would thus be decided in the same fashion (albeit not necessarily for the same reasons) in Germany.
- When the *Reserveursache* consists in third-party conduct which would lead to the liability of that third party, the defendant cannot invoke the *Reserveursache* in his or her support: indeed the third party cannot be liable for that injury since it has already been caused by the defendant, and if the *Reserveursache* sufficed to free the defendant from liability, the plaintiff would be left without compensation.²⁷ Accordingly, the first annotated case, *Baker v. Willoughby*, would likely be decided the same way (here also perhaps not for the same reasons) in Germany;
- The defendant bears the burden of pleading and proving *Reserveursachen*.²⁸

(4) Beyond that, it appears that the majority point of view, which is also supported by case-law, involves a distinction between injury to a protected *Rechtsgut* in and of itself (*Objektschaden*),²⁹ on the one hand, and injury to the *Vermögen* which is consequential to the injury to the protected *Rechtsgut* (*Vermögensfolgeschaden*),³⁰ on the other hand. An instance of the former would be damage to a piece of production machinery, whereas an example of the latter would be the loss of profit following the stoppage of production as a result of the damage to the machine. *Reserveursache* would have to be disregarded in the case of *Objektschaden* but taken into account in the case

²⁴ It does not encompass the full set of cases discussed in contemporary works under the headings *hypothetische Kausalität* or *Reserveursache*, however: Staudinger-Medicus, § 249, *ibid*.

²⁵ Staudinger-Medicus, § 249 at 57, para. 98; Münchener-Grunsky, § 249 at 388, para. 79.

²⁶ Staudinger-Medicus, § 249 at 59, para. 103; Münchener-Grunsky, § 249 at 389, para. 80; Soergel-Mertens, § 249 at 270, para. 157.

²⁷ Staudinger-Medicus, § 249 at 58-9, para. 100-1. Münchener-Grunsky, § 249 at 390-1, para. 84 and Soergel-Mertens, § 249 at 268-9, para. 153, suggest that the defendant is in fact depriving the plaintiff of a recourse against the person who is liable for the *Reserveursache*.

²⁸ Staudinger-Medicus, § 249 at 59, para. 102; Münchener-Grunsky, § 249 at 394-5, para. 9.

²⁹ Also called direct injury (*unmittelbarer Schaden*) by some authors.

³⁰ Also called indirect injury (*mittelbarer Schaden*) by some authors.

of *Vermögensfolgeschaden*.³¹ Accordingly, to continue with the previous examples, if it turned out that the plant was hit by lightning and burned down shortly after the production machinery was damaged by the defendant, the liability of the defendant for the damage to the machinery would remain unaffected, but the liability for loss of profit following the stoppage of production would cease as of the moment when the lightning strike halted production.

The rationale generally put forward for the distinction between *Objektschaden* and *Vermögensfolgeschaden* is as follows. In cases of *Objektschaden*, a *Rechtsgut* is damaged or destroyed, and the plaintiff sees his or her right to the *Rechtsgut* replaced by a right of action for reparation. In terms of risks which the plaintiff must carry, the general risk relating to the maintenance of the *Rechtsgut* (*Sachrisiko*) is replaced by the risk relating to the success of the right of action (*Forderungsrisiko*). If in such cases the defendant were allowed to rely on a *Reserveursache*, the plaintiff would in fact be burdened further with the *Sachrisiko* in addition to the *Forderungsrisiko*, which would constitute an undue burden. In contrast, *Vermögensfolgeschaden* are generally bound to an assessment of future facts (and to the risks attached to them), and in this respect it does not unfairly burden the plaintiff to allow these future facts to be reflected in the assessment of damages for that type of injury.³²

Some writers disagree with the above distinction and consider that the defendant should be able to invoke *Reserveursache* to his or her advantage in all cases, except as mentioned above in cases where the *Reserveursache* would lead to the liability of a third party.³³

(5) No case-law or doctrinal controversy has arisen under French law which would have led to a comparable discussion of the problems surrounding subsequent events. This does not mean that French law has not developed analytical tools to handle cases such as the two annotated cases, as the next cases show. A case such as *Jobling v. Associated Dairies Ltd.* could very well be decided in a similar way in France. As for a case such as *Baker v. Willoughby*, it is likely that it would be dealt with as a multiple causation problem. Accordingly, the subsequent shot in the leg could fully exonerate the defendant only if it constituted a *cause étrangère*; otherwise the liability of the defendant would remain unaffected.

³¹ Staudinger-Medicus, § 249 at 59-60, para. 104-5; Soergel-Mertens, § 249 at 269, para. 155; Larenz at 525.

³² *Ibid.*

³³ Münchener-Grunsky, § 249 at 389-90, para. 81-3; Lange at 179-81.

4.G.31., 4.F.32.

CAUSATION

*BGH, 24 April 1952*³⁴
and
*Cass. civ. 2e, 8 February 1989*³⁵
Chardin v. Garnier

4.G.31., 4.F.32.

SUBSEQUENT EVENT AGGRAVATING SITUATION OF VICTIM

The defendant is not liable for a subsequent aggravation of the situation of the victim which would not have occurred but for the original injury inflicted by the defendant but which was caused by an unrelated event which took place some time after the original injury was inflicted.

A. BGH, 24 April 1952

4.G.31.**Artillery fire**

Facts: In 1937, The victim's leg was injured when he was run over by a lorry belonging to the defendant; the leg had to be amputated. The defendant was found liable for that accident and had to pay damages to the victim. In the afternoon of 31 March 1945, the area where the victim lived with his family came under artillery fire. When the firing stopped, the victim and his family decided to go to the bunker where they usually sought cover. As they were underway, artillery fire unexpectedly resumed. The family of the victim were able run to safety in time, but the victim, because his artificial limb made him go more slowly, was fatally wounded. The victim's family sued the defendant for damages, arguing that his death was a consequence of the accident in 1937.

Held: The court of first instance, the court of appeal and the BGH dismissed the claim.

Judgment: "In the present case, even though the [victim's] walk disability must be seen as a *conditio sine qua non* for his injury through a shell fragment, the liability of the defendant is not established. There is no adequate causal link between the disability caused by the accident and the death through artillery fire...

Adequacy must already be ruled out here, since common experience tells us that the walk impairment, given its general impact, did not increase the probability to be hit by artillery fire to any significant extent. Yet a causal link in the legal sense [i.e. "legal cause"] only... exists if the condition caused by the wrongdoer is generally suitable to lead to the injury in question. Particularly unique and quite improbable circumstances, to which no attention would be paid if events had followed a normal course, must be left out... When the resulting injury lies outside of the range of probabilities, based on experience, then it must be regarded as a chance happening which can no longer be traced back [to the original wrongdoing]. This is the

³⁴ NJW 1952, 1010. Translation by A. Hoffmann and Y.P. Salmon.

³⁵ Bull. civ. 1989.II.39, JCP 1990.II.21544. Translation by Y.P. Salmon.

SEQUENCE OF EVENTS

[4.3]

situation in the present case, since according to general experience in any event, a walk disability cannot in and of itself be considered as a circumstance which considerably increases the risk of becoming injured. In case of shellfire, anyone, even able-bodied persons, can be hit. It cannot be foreseen where enemy fire will be aimed.”

B. Cass. civ. 2e, 8 February 1989

4.F.32.

Caught by fire

Facts: In 1971, the victim was severely and permanently injured in a car accident for which the defendant was found responsible. Following the accident, the defendant paid a sum to the victim by way of damages, and the victim also received a lump sum from the social security fund in compensation for his injury and its consequences. In 1981, the victim was lying in bed when a fire broke out. Due to the injuries from the car accident, the victim could not leave his bed in time, and he died in the fire. His widow sued the defendant for damages.

Held: The court of first instance dismissed the claim. The court of appeal reversed that decision and allowed the claim. The Cour de cassation quashed the judgment of the court of appeal and remitted the case for further consideration.

Judgment: “In finding the defendant liable to compensate the injury, the judgment limits itself to stating that the plaintiff’s handicap, which results from the initial accident, was the sole cause which prevented him from leaving the area affected by the fire.

It appeared from the own findings of the court of appeal that the immediate cause of death was the conflagration of the bed. Furthermore, it was alleged that the defendant and the [social security fund] had, following the accident, paid a lump sum designed to ensure that a person would take care of the victim, including the avoidance of the risks inherent to the invalidity of the victim. In ruling as it did, the court of appeal did not legally justify its decision.”

Notes

(1) The two annotated cases concern similar factual situations, where it was alleged that a subsequent event caused the death of the victim in a way which would not have been possible but for an accident for which the plaintiff was responsible some 8 to 10 years beforehand. In both cases, the court denied causation and dismissed the claim.

(2) In the first annotated case, the BGH held that the test of adequacy was not met. It found that the artificial limb did not increase the risk of being hit by artillery fire. The BGH states that events lying “outside of the range of probabilities, based on experience” must be seen as chance happenings, and then turns its reasoning around by holding that, since artillery fire (in a time of war such as in 1945) must be seen as a general hazard that can hit anyone, it is an event lying outside the realm of normal probabilities, and therefore the first accident could not be an adequate cause thereof. Commentators have questioned the soundness of the BGH reasoning, especially since it appears from the facts that it was precisely the artificial limb that prevented the victim from running for

shelter fast enough (the able-bodied family members made it to safety).³⁶

(3) In the second annotated case, the Cour de cassation found that the fire was the “immediate cause” of the death of the victim, and that accordingly the court of appeal was mistaken in finding that the accident for which the defendant was responsible was the sole cause of the death since the deceased could not leave the premises quickly enough. Commentators have criticized this decision for apparently relying on temporal proximity as a test of causation, which is not consistent with French law and can leave the plaintiff without compensation.³⁷

(4) In his comment on the second annotated case, N. Dejean de la Bâtie notes that the Cour de cassation underlined that the defendant (and a social security organization), following the first accident, had paid to the plaintiff a lump sum designed to ensure that a person would take care of the victim (*indemnité pour assistance d'une tierce personne*).³⁸ Presumably, something went wrong with the care of the victim if he could not be brought out of the house in time when the fire broke out. Dejean de la Bâtie notes that the defendant should perhaps have been allowed to invoke that as a contributory fault, but not as a bar to causation; it may be that the Cour de cassation, for policy reasons, did not want to burden the defendant with an additional damage award more than a decade after the case had been “settled” by the lump-sum payment. It could thus be that the passage of time (and especially the settlement that was intended to compensate the deceased for the extra expenses that he would incur to guard against risks such as the risk that eventually resulted in his death) brought the further consequences of the initial injury within the sphere of risk of the victim:³⁹ the victim would then have to live with the consequences of injury and take the necessary precautions to avoid further damage, although shifting the burden of further consequences fully on the victim might appear too harsh.

In the first annotated case, the defendant had also been condemned to pay damages to the victim after the original accident which led to the amputation. Similar policy considerations may therefore have played a role in the BGH decision as well, although it is not openly stated.

(5) In English law, the case of *McKew v. Holland and Hannen and Cubitts (Scotland) Ltd.* should be mentioned.⁴⁰ There the plaintiff, some days after the defendant had negligently injured his leg, suffered further injury because his injured leg gave way while he was descending a steep stairway without a handrail. The House of Lords found that the plaintiff was the sole cause of his further injury by foolishly exposing himself

³⁶ Staudinger-Medicus, § 249 at 51, para. 81; Soergel-Mertens, § 249 at 255, para. 130.

³⁷ Viney and Jourdain, *Conditions* at 174-5, para. 357-1; Jourdain at 160/12, para. 52. Starck, Roland and Boyer at 443, para. 1073, finds that the annotated case does not fit with the rest of the case-law.

³⁸ N. Dejean de la Bâtie, Comment at JCP 1990.II.21544.

³⁹ See, for German law, Lange at 152.

⁴⁰ [1969] 3 All ER 1621, HL.

SEQUENCE OF EVENTS

[4.3]

to danger.⁴¹

⁴¹ See further *Clerk & Lindsell on Torts* at 58-9, para. 2-31; Rogers at 230-1; Markesinis and Deakin at 193-4.